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Roger Atkinson; Polly Atkinson; Roger Atkinson and Polly Atkinson; Chad Atkinson v. IHC Hospitals, Inc., Intermountain Health Care Hospitals Inc., Scott Wetzel Services Inc., Scott Olsen, Stephen G. Morgan, Morgan, Scalley and Reading : Response to Petition for Rehearing

Utah Supreme Court

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Dale F. Gardiner; Robert J. Debry and Associates; Attorneys for Plaintiffs.
B. Lloyd Poelman; David B. Erickson; M. Karlynn Hinman; Kirton, McConkie, and Poelman; Carman E. Kipp; Heinz J. Mahler; Kipp and Christian; Paul S. Felt; Ray, Quinney and Nebeker.

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BRIEF

IN THE SUPREME COURT OF UTAH

ROGER ATKINSON; POLLY ATKINSON: and ROGER ATKINSON AND POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON,	:	
Plaintiffs/Appellants,	:	Supreme Court No. 880310
vs.	:	
IHC HOSPITALS, INC. aka INTER-MOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation; SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I through X,	:	Category 10
Defendants/Respondents.	:	

RESPONSE TO PETITION FOR REHEARING

ROBERT J. DEBRY
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107

PAUL S. FELT
RAY, QUINNEY & NEBEKER
P.O. Box 45385
Salt Lake City, Utah 84145

B. LLOYD POELMAN
KIRTON, McCONKIE & POELMAN
330 South 300 East
Salt Lake City, Utah 84111

CARMAN E. KIPP - #1829
HEINZ J. MAHLER - #3832
KIPP AND CHRISTIAN, P.C.
City Centre I, #330
175 East 400 South
Salt Lake City, Utah
84111-2314

Attorneys for Defendants/ Respondents Stephen G. Morgan and Morgan, Scalley & Reading

FILED

SEP 21 1990

Clerk, Supreme Court, Utah

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KIRTON, McCONKIE & POELMAN
330 South 300 East
Salt Lake City, Utah 84111

CARMAN E. KIPP - #1829
HEINZ J. MAHLER - #3832
KIPP AND CHRISTIAN, P.C.
City Centre I, #330
175 East 400 South
Salt Lake City, Utah
84111-2314

Attorneys for Defendants/ Respondents Stephen G. Morgan and Morgan, Scalley & Reading

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Respondent Stephen G. Morgan and Morgan, Scalley & Reading (hereinafter "Morgan"), hereby responds to Appellants' Petition for Rehearing:

ARGUMENT

POINT I

THIS COURT DID NOT ERR IN FINDING THAT THE PROBATE HEARING WAS CONDUCTED IN A JURIS PRUDENTIAL MANNER

The Appellants (hereinafter "the Atkinsons") claim, that Judge Fishler did not properly perform his duties in approving the settlement agreement, is without merit. The Atkinsons provide no proposal as to what they claim Judge Fishler should have done. Having reviewed the settlement agreement, the pleadings and documents submitted to him, and having questioned the Atkinsons, Judge Fishler made a proper judicial determination that the rights of the minor child were adequately protected and in fact, ordered the Atkinsons to post a bond to ensure that the minor child would be fairly treated.

The Atkinsons' claim of judicial misconduct against Judge Fishler is without merit.

POINT II

THIS COURT DID NOT ERR IN AFFIRMING SUMMARY JUDGMENT GRANTED TO MORGAN

The Atkinsons claim that "fact issues abound" as to whether or not Morgan was their lawyer. However, the so called disputed "facts" have been considered both by the trial court and by this Supreme Court and found to be insufficient to create a "genuine controversy" See Heglar Ranch, Inc. v. Stillman, 69 P.2d 1390 (Utah 1980).

The only "facts" presented by the Atkinsons is the continued claim that they understood Morgan to be their lawyer. As has been previously shown in Morgan's Respondents' Brief, during oral argument, and by the opinion of this court, such a claim by the Atkinsons flies in the face of all the facts and evidence to the contrary.

Further, the Atkinsons admit that they were not represented by Morgan in their Petition for Rehearing stating:

> ...the trial court judge relied upon the evaluation of a 19-year old boy...and his 16 year old wife. (Both of whom were unrepresented by counsel.) (emphasis added)

(Petition for Rehearing, p. 3).

This respondent respectfully submits that should this court allow the Atkinsons' claim of malpractice against Morgan to proceed, it would be difficult if not impossible for an attorney in Utah to safely deal with a pro se opposing party without the danger of facing the same claims that the Atkinsons are making.

The crux of the Atkinsons' request to this court is to find that all a disgruntled pro se party has to do is to assert, "we thought he was our lawyer", and regardless of how illogical such a claim would be under the circumstances, and no matter if all the evidence is to the contrary, such a claim should nevertheless go to a jury.

It is a fact of legal practice that lawyers must, at times, deal with pro se parties. This will, as occurred herein, require meetings with a pro se party, reviewing documents with a pro se party, and appearing in court at the same time as a pro se party. These actions do not create a "lawyer-client" relationship.

As to the case law cited in connection with the Atkinsons' constitutional claims, the citations are not relevant for the reason that there are no material facts that are in dispute or genuinely controverted. Further, the Atkinsons' constitutional claims are raised for the first

time in this Petition for Rehearing and thus, even if they had merit, are raised untimely.

A

THERE ARE NO GENUINE ISSUES OF FACT IN DISPUTE

The Atkinsons' claim to provide this court with "evidence" of disputed issues. However, the Atkinsons cite only the same statements the Atkinsons made after filing suit, to the effect that they understood Morgan to be their lawyer, which statements are directly contrary to the evidence.

This court held in Thornock v. Cook, 604 P.2d 934 (Utah 1979) that a defendant cannot rely merely upon her allegations to avoid summary judgment but must set forth specific facts showing that there is a genuine issue for trial. This the Atkinsons have failed to do.

Further, it is important to note that even if a genuine fact issue existed as to whether or not Morgan was the Atkinsons' lawyer, summary judgment was still correctly granted by the trial court because the Atkinsons failed to provide any evidence by expert testimony or otherwise that any action on the part of Morgan violated the applicable standard of care. Also, there is no testimony or evidence in the record, expert or otherwise, on the issue of

causation. There is no causation between the actions of Morgan and the alleged damages of the Atkinsons. The only damages claimed are the "inadequate settlement", and the terms and conditions of the settlement were agreed upon by the Atkinsons and I.H.C. prior to the time of Morgan's involvement.

In Abdul Kadir v. Western Pacific Railroad, 7 Utah 2d 53 318 P.2d 339 (Utah 1957) this court held:

> We are in accord with the idea that the right of trial by jury should be scrupulously safeguarded. This of course does not go so far as to require the submission to a jury of issues of fact merely because they are disputed. If they would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort, and expense in trying them, the saving of which is the very purpose of summary judgment procedure.

318 P.2d at 341.

The Atkinsons' request for a rehearing based on disputed "facts" is without merit and should be denied.

B

THE ATKINSONS RELIED ON THEIR OWN JUDGMENT AS TO THE FAIRNESS OF THE SETTLEMENT.

The Atkinsons claim that they relied on the judgment of Judge Fishler as to the fairness of the settlement and

therefore, take issue with this court's opinion that they Atkinsons did not rely on the probate judge.

It should first be noted that the Atkinsons' argument presupposes that Judge Fishler was in error and that the settlement agreement was inadequate or unfair. There is nothing in the record to support such a supposition. The basis of the settlement agreement was that the Atkinsons' child was injured while in the care of a hospital operated by I.H.C. A dispute existed as to whether or not the injury was caused by any negligence of the hospital or health care providers. To resolve this dispute, negotiations took place between I.H.C. and the Atkinsons. The Atkinsons were assisted in their negotiations by George Atkinson, a union negotiator at Kennecott. In response to a settlement proposal prepared by I.H.C., George Atkinson prepared a sophisticated ten page counterproposal. Eventually a settlement was reached which was considered fair and adequate by all the parties. (R. 156, 269-270, 651, pp. 20-26, R. 644, p. 115).

Judge Fishler carefully reviewed the documents, questioned the Atkinsons and thereafter approved the settlement.

The Atkinsons' statements as to the reliance on the findings of Judge Fishler as a basis for granting a rehearing is without merit.

C

The Atkinsons' arguments as to whether or not they were mislead about the settlement addresses matters involving I.H.C. and not this respondent.

D

MORGAN DID NOT PROVIDE "LEGAL ADVICE" TO THE ATKINSONS

This court correctly stated that "Morgan's explanation of the probate proceedings, when viewed in the concept of this case, did not constitute the rendering of legal advice."

Morgan was retained by I.H.C. to prepare the relevant settlement documents on behalf of I.H.C. to present to the probate court. If the Atkinsons had chosen to obtain counsel, Morgan would have met with opposing counsel to review the documents and to ensure their approval by the opposing party, and would have appeared in court with opposing counsel. However, the Atkinsons did not have an attorney and Morgan had no choice but to meet with them to review the relevant documents and appear at the same time as

the Atkinsons before the probate judge. These actions did not make Morgan the Atkinsons' lawyer and does not constitute the provision of "legal advice". Morgan merely made statements of fact as to what the documents were and the fact that court approval was necessary.

The Atkinsons claim that a "jury may infer that the Atkinsons thought they were getting legal advice." (Petition for Rehearing, p. 15). These speculations do not change the facts. The Atkinsons' arguments as to Morgan rendering "legal advice" are without merit and should be rejected.

E

THE ATKINSONS CONSULTED WITH AN ATTORNEY AND CHOSE NOT TO OBTAIN LEGAL COUNSEL

The Atkinsons take issue with the court's findings that "the Atkinsons...apparently did discuss a settlement with an attorney of their choosing." However, the Atkinsons admitted the same to Judge Fishler in open court:

> THE COURT: And your name, Sir?
>
> MR. ATKINSON: Roger W. Atkinson.
>
> THE COURT: Have you sought the advice of legal counsel in this matter?

> MRS. ATKINSON: I have talked with someone about it but we are not planning on getting a lawyer.
>
> THE COURT: Have you talked to a lawyer?
>
> MRS. ATKINSON: Yes, I have just asked him a few things about it, and he said we really should not -- we shouldn't have to sue them if they are giving us an offer.

As this court correctly stated in its opinion, the above-cited statements clearly show that the Atkinsons did not consider Morgan to be their lawyer, that these statements do not refer to Morgan and that the Atkinsons had consulted with an attorney and decided not to retain an attorney on the advice of that lawyer, (who presumably told them that they wouldn't have to sue if they are being given an offer).

Morgan, in discussing this statement of Mrs. Atkinson testified in his deposition:

> **A:** ...I assume by that statement she had talked to another lawyer because I never made that statement to her.
>
> **Q:** Did you ever ask Mrs. Atkinson what she meant by that statement which you just read to me?
>
> A: No.
>
> Q: And you say that you never told her that she shouldn't sue them because they made an offer?

A: Absolutely not. That is a ridiculous statement.

(R. 652, pp. 45-46).

The Atkinsons now claiming that they were referring to Morgan when making these statements concerning a lawyer, flies in the face of logic and makes no sense under the circumstances. The Atkinsons' attempts to explain away the obvious are without merit and do not constitute sufficient reason to grant their Petition for Rehearing.

POINT III

MORGAN DID NOT HAVE A CONFLICT OF INTEREST

The Atkinsons' statement in their Petition for Rehearing that: "even if there was no attorney/client relationship, Morgan still had a duty to advise the Atkinsons of his conflict of interest" is a paradox. As has been previously briefed, no attorney/client relationship existed between the Atkinsons and Morgan. The Atkinsons' claim of a "conflict of interest" is solely based on the following statements by Roger Atkinson:

Q: You didn't ever ask him [Morgan] if this is a good or bad deal isn't that true?

A: I think not. I think I did ask him that.

Q: What did he say?

A: I don't recall. I think he asked us back if we thought it was fair. (emphasis added)

(R. 644, pp. 118-119).

First, Mr. Atkinson was not certain that the conversation ever took place. He also did not recall what Morgan's response was but merely stated that he "thought" Morgan asked the Atkinsons if they thought it was fair.

Even if the conversation took place as the Atkinsons "thought", it may have taken place, the Atkinsons admit that Morgan did not provide any opinion on the fairness of the settlement. In fact, Morgan could not have given such an opinion since he was at no time aware of the details of the injuries or the negotiations that resulted in the settlement. Morgan had no basis upon which to evaluate or judge the fairness of the settlement nor was it his duty to do so.

The Atkinsons' reliance on an affidavit of Richard Henriksen is also misplaced. The affidavit in question was not timely and properly filed, and did not specifically address the matters at issue. The affidavit merely dealt in generalities and hypotheticals, none of which applied to or referred to Morgan or the factual issues before the trial court.

Morgan did not have a conflict of interest. Morgan was at no time the Atkinsons' attorney nor did he at any time offer legal advice to the Atkinsons or provide an opinion as to the adequacy or fairness of the settlement.

Finally, under the circumstances it would have made no sense for Morgan to advise the Atkinsons to obtain counsel. It was clear by the facts presented to Morgan, that they had chosen not to do so. For the Atkinsons to allege in their Petition for Rehearing that "if Morgan had advised the Atkinsons to obtain an independent attorney, there would have been another ending to this story" is without merit and should be rejected as a basis for granting the Petition for Rehearing.

POINT IV

THE AFFIDAVIT OF RICHARD KING IS IMPROPER

Finally, it should be noted that the Affidavit of Richard King filed in support of the Petition for Rehearing is improper. The Affidavit attempts to raise issues, not only for the first time on Appeal, but for the first time on Petition for Rehearing. Further, the Affidavit does not provide relevant or useful information. What Dr. King appears to be saying is that the Atkinsons have found themselves trying to explain away previous statements, such

as their statements before Judge Fishler, in an attempt to fit the claims they are now making against Morgan, and that after reviewing the inconsistent and illogical explanations of the Atkinsons, Dr. King has reached the conclusion that perhaps they were or perhaps they were not telling the truth.

Furthermore, this Affidavit is based on assumptions and suppositions made by Dr. King. Finally, if this Affidavit is viewed in whole or in part as an attempt by Dr. King, a psychologist, to testify as to the standard of care or of the actions of Morgan in the field of law, to that extent the Affidavit is further improper and inadmissible pursuant to this court's holding in Burton v. Youngblood, 711 P.2d 245 (Utah 1985). The Affidavit of Richard King should be rejected as a basis for granting the Petition for Rehearing.

CONCLUSION

Morgan was retained by I.H.C. to provide legal services to I.H.C. specifically to draft documents in connection with a settlement agreement and present them to the probate court for approval. No attorney/client relationship existed at any time between Morgan and the Atkinsons, either express or implied. Morgan did not provide any legal services or give legal advice as a volunteer or otherwise to the Atkinsons. All of Morgan's legal services were performed for the

benefit and on behalf of I.H.C. as reflected on all of the pleadings and documents.

Judge Fishler verified with the Atkinsons that they were not represented by counsel, that they had consulted with an attorney, not Morgan, and had chosen not to obtain counsel. Judge Fishler acted properly in approving the settlement. At no time has there been any evidence that the settlement was inadequate.

The Atkinsons have utterly failed to show the existence of any of the required elements of a legal malpractice claim. Even if a question of fact did exist as to whether or not Morgan was their lawyer, at no time has there been any evidence presented by expert testimony or otherwise that Morgan acted below the standard of care. The settlement agreement which is the subject of this lawsuit was completely agreed upon by the Atkinsons and I.H.C. prior to Morgan's involvement. There is no causation between any act of Morgan and the only claim of damages by the Atkinsons, specifically the terms of the settlement agreement.

The Atkinsons' Petition for Rehearing is without merit and this respondent respectfully requests that the same be denied.

DATED this 21st day of September, 1990.

KIPP AND CHRISTIAN, P.C.

CARMAN E. KIPP
HEINZ J. MAHLER
Attorneys for Defendant/
Respondent Stephen G.
Morgan and Morgan, Scalley
& Reading

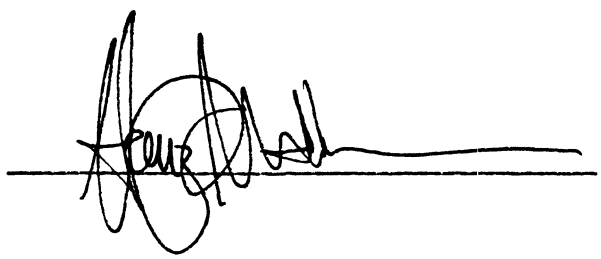
CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent Stephen G. Morgan to Appellants' Petition for Rehearing was mailed, postage prepaid, first-class, on the 21st day of September, 1990, to the following:

Robert J. DeBry
ROBERT J. DeBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107

Paul S. Felt
RAY, QUINNEY & NEBEKER
P.O. Box 45385
Salt Lake City, Utah 84145

B. Lloyd Poelman
KIRTON, McCONKIE & POELMAN
330 South 300 East
Salt Lake City, Utah 84111



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BRIEF
DOCKET NO. 880340

IN THE UTAH SUPREME COURT
STATE OF UTAH

ROGER ATKINSON; POLLY ATKINSON; and ROGER ATKINSON and POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON, Plaintiffs/Appellants, v. IHC HOSPITALS, INC. a/k/a INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I through X, Defendants/Respondents.	IHC HOSPITALS, INC.'S BRIEF OPPOSING PETITION FOR REHEARING Civil No. 88-0310 Category 10 or 16

Dale F. Gardiner
Robert J. Debry
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-Appellants
401 South 700 East #500
Salt Lake City, Utah 84107

B. Lloyd Poelman (A2617)
David B. Erickson (A3788)
M. Karlynn Hinman (A3908)
KIRTON, McCONKIE & POELMAN
Attorneys for IHC Hospitals
330 South Third East
Salt Lake City, Utah 84111

Carman E. Kipp
Heinz J. Mahler
KIPP & CHRISTIAN, P.C.
Attorneys for Steven G. Morgan and Morgan, Scalley & Reading
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111

Paul S. Felt
RAY, QUINNEY & NEBEKER
Attorneys for Scott Wetzel, Inc. and Scott Olsen
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah

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IN THE UTAH SUPREME COURT
STATE OF UTAH

ROGER ATKINSON; POLLY ATKINSON; and ROGER ATKINSON and POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON, Plaintiffs/Appellants, v. IHC HOSPITALS, INC. a/k/a INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I through X, Defendants/Respondents.	:	IHC HOSPITALS, INC.'S BRIEF OPPOSING PETITION FOR REHEARING Civil No. 88-0310 Category 10 or 16

Dale F. Gardiner
Robert J. Debry
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-Appellants
401 South 700 East #500
Salt Lake City, Utah 84107

B. Lloyd Poelman (A2617)
David B. Erickson (A3788)
M. Karlynn Hinman (A3908)
KIRTON, McCONKIE & POELMAN
Attorneys for IHC Hospitals
330 South Third East
Salt Lake City, Utah 84111

Carman E. Kipp
Heinz J. Mahler
KIPP & CHRISTIAN, P.C.
Attorneys for Steven G. Morgan and Morgan, Scalley & Reading
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111

Paul S. Felt
RAY, QUINNEY & NEBEKER
Attorneys for Scott Wetzel, Inc. and Scott Olsen
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84111

IDENTITY OF PARTIES

Appellants:	Chad Atkinson (Minor) Roger Atkinson Polly Atkinson
Respondents:	Scott Wetzel Services, Inc., a Utah corporation, and Scott Olsen, employee and manager of Wetzel
	IHC Hospitals, a/k/a Intermountain Health Care Hospitals, Inc.; and Primary Children's Hospital, a hospital operated by Intermountain Health Care Hospitals, Inc.
	Stephen G. Morgan and Morgan, Scalley & Reading

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PRELIMINARY STATEMENT

IHC Hospitals, Inc., a/k/a Intermountain Health Care ("IHC") opposes the petition for rehearing.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over the Petition for Rehearing and of the appeal pursuant to Utah Code Annotated § 78-2-2(3)(j); see also Rule 35, Utah Rules of Appellate Procedure.

FACTS

Roger Atkinson and Polly Atkinson, individually and as guardians ad litem for Chad Atkinson (collectively, the "Atkinsons"), alleged (1) that the settlement of approximately $1 million for Chad Atkinson, approved more than four years before the Atkinsons brought this suit, should be reopened or reconsidered and (2) for alleged attorney malpractice (see Record ["R."] 415-18). The trial court granted summary judgment, and this Court unanimously affirmed. Atkinson v. IHC Hospitals, 138 Utah Adv. Rep. 3 (S.Ct. 1990).

ARGUMENT

I. NO ERROR OF LAW HAS BEEN MADE; NO ERROR WILL BE REPEATED.

Quoting limited portions of this Court's opinion, the Atkinsons assert that this Court has overlooked the mandate of the Legislature that a court must "determine[]" that a transaction is in the best interests of the protected person. Utah Code Ann. § 75-5-409(2). Careful review of the probate court

opinion,[1] this Court's opinion, the statute and the transcript of the proceedings of the probate court[2] reveals no error.

The probate court had the text of the settlement terms and release available to review[3] and the parents to question about their understanding of the terms. The probate court was adequately and properly apprised. Even the Atkinsons' partial quotation, with significant ellipses, from this Court's opinion does not impose new standards or shirk from statutory responsibilities. There is no error of law which may be repeated to the detriment of "hundreds" of future litigants.

After quoting 42 Am. Jur.2d Infants, § 154 (1969) and referring to Kansas and Tennessee cases[4] about evaluating settlements of infants' claims, the only "evidence" which the Atkinsons quote to try to demonstrate that the probate proceedings were inadequate is one question addressed to Judge Fishler at his deposition. He answered that he did not evaluate the underlying claim against IHC. (Fishler Dep. at 51.)

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[1] A copy of the probate court's decision is attached as Addendum F to the brief on appeal of Respondents Morgan and Morgan, Scally & Reading (the "Morgan Brief").

[2] See Transcript of Settlement, Fishler, J., July 22, 1983 ("Tr.") attached as Addendum A to Morgan Brief.

[3] Addenda C, D and K to Morgan Brief.

[4] Western Life Ins. Co. v. Nanney, 290 F.Supp. 687 (C.D. Tenn 1968); Missouri Pacific R. Co. v. Lasca, 99 P. 616 (Kan. 1909). Petitioners also refer to Perry v. Umberger, 65 P.2d 280 (Kan. 1909).

Neither Am.Jur.2d nor the cited cases require an evaluation of the underlying claim -- this supposed requirement is imposed only by the Atkinsons in their argument. The factors enumerated by the cited authorities were all well-covered by Judge Fishler's review of the nature of the injury (brain damage), the amount recovered ($900,000 [guaranteed][5]), the fact that both Mr. and Mrs. Atkinson believed the child had a claim against IHC, their understanding that they could not sue IHC again regardless of changes in the child's condition and the terms and conditions of the settlement and recovery, which provided, in part, that the child's injuries "are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite. . . ." (Addendum C to Morgan Brief.)

The probate judge was entitled to consider whether the parents thought the settlement reasonable in making his own determination, but that is not, as the Atkinsons imply, the only thing he considered. The judge was also entitled to impose conditions for the child's interests -- which he did by requiring the parents to be bonded and to submit annual reports. Judge Fishler stated in his affidavit:

> Among other things the Court verified with the parents that they did not intend to obtain an attorney and that they had con-

---

[5] The settlement guarantees $900,000 plus certain free medical care for the child. If the child lives to age 65, the settlement will be worth at least $1.28 million. IHC has complied with the settlement requirements and has made and continues to make timely payments.

> sulted with an outside lawyer. (see page 2 of the transcript, lines 7 thru 14 [sic].)
>
> 7. The affiant ascertained that both parents desired to complete the settlement as they had agreed with Intermountain Health Care, Inc., and that they felt that it was in the best interest of the child and themselves, and that upon hearing their testimony, the Court concluded that it was in the interest of the minor and the parents to complete the settlement terms which had been agreed between the parties.

Fishler Affidavit, Addendum P to Morgan Brief, emphasis added.

Moreover, the Petition for Appointment of Conservator and Order to Approve Settlement recited that the "child sustained accidental injuries while in the care" of an IHC hospital and that the injuries from a plugged breathing tube "involved brain damage, to an extent which has not been ascertained at this time. . . ." (Addendum B to Morgan Brief.) Judge Fishler had ample information before him.

Nothing in the proceedings deprived the child of the benefit of some $900,000 for his brain damage, free medical care (which has been extensive), funds for education. The parents also received money. Every reasonable precaution was taken to assure that the funds would be used for the child in accord with the structured settlement.

It is the Atkinsons who err by trying to assert that approval was granted without, for example, consideration of the settlement agreement and release, which they brought to the

probate court. As this Court correctly concluded, everything was done in a jurisprudential manner.

II. THE PETITIONERS' CONTENTIONS AND ARGUMENTS LACK MERIT.

1. The Parents' Age Is Irrelevant.

The Atkinsons claim that their age and recently alleged illiteracy at the time the settlement was approved require new proceedings. Mr. Atkinson, the father, was then 19, having reached his majority. He was legally competent to vote, to enlist in the military, to marry and to have left compulsory schooling. His parents no longer had any obligation to support him.[6] He was old enough to be appointed as the guardian of his child and to be trusted to manage, together with his wife, approximately $1 million in benefits and payments for his child. He had a tenth-grade education but now asserts, without proof, that he was barely able to read. The law imposes no literacy test on marrying, on fathering, or on parenting.[7]

---

[6] See, inter alia, United States Constitution, Amendment XXVI, Utah Code Ann. §§ 53A-11-101, 78-45-3.

[7] The Court specifically asked Mrs. Atkinson if she understood that she would have no future claim against IHC even if the child's condition worsened, and she said she did. (Tr. at 2.) Significantly, the Atkinsons allege only Mr. Atkinson's near illiteracy, avoiding the question whether Mrs. Atkinson was truthful when she said she understood. Mr. Atkinson was able to answer oral questions, showing his personal understanding of the questions asked. (Tr. at 3-4.)

Mrs. Atkinson, aged 16, was a married woman, willing to give birth and willing to apply for and accept the court-ordered guardianship (with her husband) of her child. She is the beneficiary of years of effort by women to be recognized as persons, not chattel, under the law.[8] The Court should not ignore laws according rights to women. This is not the case nor the time to reverse statute and precedent. The Atkinsons' allegations about age and illiteracy are not persuasive and do not justify rehearing.

No one ever questioned the Atkinsons' right as parents to keep their child, nor have there been any allegations of their inability to serve as his parents and his legal guardians or to provide his daily nurture. Had there been no injury to their child, the law would have had no concern with his care, unless they violated child support or criminal statutes.[9]

The law permits young and old parents to raise their children; it should not, because of the Atkinsons' age, favor them with relief from a settlement they supported in court. The Atkinsons should not benefit from age discrimination. The

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[8] See, e.g., Utah Code Ann. 63-3-1 et seq.

[9] Indeed, if persons of their respective ages had had a child born out of wedlock, they could have decided whether to marry, whether to place the child for adoption (terminating all parental rights) or whether one or the other would retain custody with the possibility of receiving support from and according visitation to the other.

Atkinsons cannot be permitted to pick and choose their rights, responsibilities and competencies.

Moreover, the Atkinsons have failed to show any causal connection between their ages or their alleged illiteracy and the value of the settlement; there is no evidence that, had they been older or more literate, the settlement would have been larger or different. There is no evidence that the settlement itself is inadequate or unreasonable or could have been so discerned or proven.

2. **The Atkinsons Were Advised As They Chose**.

Mr. Atkinson's father, George Atkinson, described himself as a union negotiator, chosen to negotiate on behalf of his union with a major mining corporation. He offered a proposal of settlement which was rejected by IHC. The fact that the Atkinsons did not hold out for the terms of George Atkinson's alternative proposal does not mean that they failed to follow George Atkinson's advice or did not have its benefit.

Even the most experienced and competent of lawyers, arbiters and negotiators win some cases and lose others. The fact that George Atkinson's proposal did not prevail does not mean that a different proposal was unfair or fraudulent. Most negotiators ask for more than they expect; it is only speculation when the Atkinsons now argue they acted without George Atkinson's advice because his views did not prevail.

No one has reviewed (and no one needs to review) the reasonableness of the position George Atkinson urged during negotiations; no one has an obligation to prove that a rejected proposal was fair or reasonable or should have been imposed by a court. The fact that another proposal was made does not make that proposal fair, better or worse than the settlement approved by the Court.

To attempt to build a case of fraud in a court-approved settlement on the fact that some other proposal was not accepted is to engage in chimera. No one knows or can establish what might have occurred had the Atkinsons refused any settlement other than that proposed by George Atkinson. IHC refused his terms and has no burden to show why it did not yield to them.

No one knows at what point a refusal to compromise might have required court action by the Atkinsons. A jury might or might not have awarded $900,000 to their child. No one knows, and no one can know because there is no record of what <u>might</u> have been <u>if</u>. The Atkinsons' argument requires the Court to indulge in speculation; that is improper in the judicial process.

3. **<u>The Atkinsons Chose Not to Be Represented by Counsel</u>.**

IHC agrees with the position of Respondents Stephen G. Morgan and Morgan, Scalley & Reading in their response to the petition for rehearing. The Atkinsons consulted an attor-

ney but chose not to retain one. They were, with the aid of themselves and Mr. Atkinson's father, able to get approximately $1 million; there is no evidence that they might have gotten another sum otherwise. They might have gotten less and could have incurred large legal fees.

IHC also agrees that the Atkinsons have no claim of legal malpractice. An attorney representing one party when the other side chooses to appear pro se should be under no obligation to assist the pro se opponent as the Atkinsons urge.

4. **The Probate Court Made a Proper Determination.**

The Atkinsons' abdication of responsibility -- their argument that they relied on the judge to be sure things were fair -- raises several considerations. The first is that the Atkinsons, after conversing with an unidentified attorney, felt no need to sue because a settlement had been offered to them. The Atkinsons chose whether to offer the settlement for confirmation; they asked to be appointed guardians without bond for that purpose. (R. 421.) Their choices indicate their exercise of judgment and responsibility. After negotiating for a guaranteed $900,000, it is disingenuous for them now to claim that they relied on the judge to protect their child.

But, even if the Atkinsons did rely on the court, there is no evidence that their reliance on the court was misplaced, nor is there any evidence to show that the probate judge was concerned with anything other than the child's prot-

ection. The fact that the judge required the Atkinsons to post bond and file reports evidences the propriety and breadth of the judge's concern for the child. The Atkinsons' reliance on the judge does not require rehearing or reopening of the settlement. The Atkinsons have no proof that the settlement should not have been approved.

5. **Questioning the Judge Creates Serious Problems of Legal and Judicial Policy.**

Judge Fishler's resignation from the bench provided the parties with the unusual opportunity to obtain the affidavit and deposition of a judge who sat on a case. Although some situations exist in which judges have been questioned about their judicial tenure (e.g., when criminal charges have been filed), IHC respectfully submits that it is a dangerous precedent to permit a disgruntled litigant to question a judge as part of an appeal or a collateral attack on a judgment. The judicial process provides litigants with an appellate procedure and prescribed forms of collateral attack by rule and statute.

To permit a judge -- even one no longer active on the bench -- to be questioned about the judicial process creates a sharp departure in legal proceedings and may be the precursor of naming judges as defendants and seeking to find them liable for a new claim of judicial malpractice. Judicial decisions should be challenged under settled principles of law and judicial review, not on the recollections of judges about the

questions they asked or the thoughts they may have had in exercising their powers and applying their discretion. Such a departure in the judicial process should not develop from happenstance. A policy decision to modify the appellate process should arise from judicial rule or legislative enactment; a constitutional amendment may be required.

Despite the problems inherent in examining judicial memories, Judge Fishler's deposition and the affidavit give no reason why rehearing should be granted or why, ultimately, anyone should conclude that the settlement accepted by the Atkinsons for their child was not fair. Judge Fishler's testimony shows his proper judicial behavior with no violation of legal standard.

6. **The Affidavit of a Psychologist Should Carry No Weight.**

The affidavit of Richard King Mower offered by the Atkinsons in support of their petition should have no place in these proceedings. An attempt to raise a factual issue on a petition for rehearing is virtually unprecedented and certainly untimely. Moreover, the content of the affidavit offers nothing to assist the Court. It consists of quotations from court and deposition testimony and from this Court's decision, which Mr. Mower attempts to interpret.

Research has yielded no precedent in which a psychologist's analysis of a portion of the record has been substituted for the analysis of a judicial panel on a petition

for rehearing. The Atkinsons nowhere establish why Mr. Mower's inconclusive interpretation should be given deference or why his affidavit should be recognized by the Court on rehearing.

Even if the Atkinsons' statements were to be interpreted as Mr. Mower suggests and even if Mr. Mower is accurate that a juror could join him or oppose him on the subjects about which he opines, his views fail to demonstrate a triable issue as to the underlying propriety of the settlement. In short, his statements, even if accepted as the views of an expert in psychology, fall far short of establishing anything with enough legal merit to justify further proceedings by this Court. His affidavit does not show any impropriety in the summary judgment decision or in this Court's unanimous affirming opinion.

Litigants should not be permitted to create or offer new facts or new disputes on a petition for rehearing, as the Atkinsons attempt with the Mower affidavit; this is another distortion of the appellate procedure and a distortion of the concept of "record". It is a distortion which cannot be permitted without the approval of judicial rulemaking, legislative enactment or constitutional amendment. The judicial and appellate process should not so easily fall prey to untimely though imaginative efforts of counsel.

7. <u>There Is No Meritorious Constitutional Claim</u>.

Neither Mr. Mower's inconclusive views about the Atkinsons' statements nor his lay analysis of judicial reason-

ing nor anything else argued by the Atkinsons creates a constitutional issue at this untimely juncture. The standards for granting summary judgment are clear and were properly recognized by this Court in affirming the trial court. Summary judgment has long been recognized as a proper and constitutional means of resolving litigation, in no manner creating a denial of constitutional right to jury trial. Constitutional questions do not shine from the murky analysis and arguments of the Petitioners.

8. **Valid Justifications for Summary Judgment Remain Unscathed.**

The Atkinsons' petition for rehearing purports to raise three issues about the case, none of which is valid, as demonstrated. The Atkinsons do not attack the numerous grounds for summary judgment which were previously argued and which still justify this Court's unanimous decision. The Atkinsons' attack on the settlement is barred by all possible limitations periods pertaining to medical malpractice claims. See Utah Code Ann. §§ 78-14-3(29), 78-14-8, 78-14-4(1). Their fraud and misrepresentation claims, insofar as they may be construed as separate from the underlying medical/injury claim, are barred by a three-year limitation period. Utah Code Ann. § 78-12-26(3). Their fraud and misrepresentation claims are further barred by their refusal to rescind the settlement agreement -- they have received and continue to retain its benefits. The Atkinson's claims were previously settled in open court, so

this action is collaterally estopped. Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978), see also Robertson v. Campbell, 674 P.2d 1226 (Utah 1983); Berry v. Berry, 738 P.2d 246 (Utah App. 1987).

The evidence is uncontradicted that the Atkinsons refused an offer at no charge to have the child independently evaluated out of state. In open court, the Atkinsons acknowledged that their child had brain damage. In open court, Mrs. Atkinson acknowledged that by settling they could not again claim against IHC, even if the child's condition worsened. The release filed in open court recites the financial provisions of the settlement and also states that the extent and permanence of damage to the child may not be known. The parents acknowledged in open court that they believed their child had a claim, and Mr. Atkinson responded coherently when the $900,000 amount of the settlement was mentioned by the probate judge. All of these factors support summary judgment against the Atkinsons.

There is no merit to any claim or argument by the Atkinsons to invalidate summary judgment against them; ample grounds for summary judgment exist and persist even against the speculative reasons the petitioners offer for reargument.

CONCLUSION

It is the mark of a competent and qualified judiciary that it attends carefully to allegations of error. However, a

mere allegation of error supported by purported facts raised post-appeal and alleged disputes over facts insufficient to prove the merits of an underlying claim do not justify reargument. The Atkinsons' petition for reargument lacks merit and should be denied. IHC seeks such other and further relief, including costs, as may be just and proper.

Dated: September 27, 1990.

Respectfully submitted,

KIRTON, McCONKIE & POELMAN

By: M. Karlynn Hinman

B. Lloyd Poelman
David B. Erickson
M. Karlynn Hinman

Attorneys for Defendants/
Respondents IHC Hospitals,
Inc., a/k/a Intermountain
Health Care

PROOF OF SERVICE

The undersigned attorney for respondent IHC Hospitals, Inc. a/k/a Intermountain Health Care Hospitals, Inc. hereby certifies that on September 27, 1990, she caused the foregoing IHC Hospitals, Inc.'s Brief Opposing Petition for Rehearing to be served on all of the parties by mailing copies thereof by first class mail, postage prepaid, addressed to their attorneys, as follows:

Paul S. Felt
Ray, Quinney & Nebeker
P.O. Box 45385
Salt Lake City, Utah 84145

Carman Kipp
Kipp & Christian
175 East 400 South, #330
Salt Lake City, Utah 84145

Robert J. DeBry
Dale F. Gardiner
Robert J. DeBry & Associates
4252 South 700 East
Salt Lake City, Utah 84107

Dated this 27 day of September, 1990.

M. Karlynn Hinman

M. Karlynn Hinman